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Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Worthy Industries Corp.

**File:** B-240489

**Date:** November 27, 1990

Jules W. Wertheimer for the protester.  
Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.  
Jeanne Isrin, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

A claim of bad faith on the part of contracting officials requires substantial proof of a specific and malicious intent to injure the protester, which is not met by the mere failure of contracting officials to grant a discretionary extension to process a certificate of competency.

### DECISION

Worthy Industries Corp. protests the award of a contract to Isratex, Inc. under invitation for bids (IFB) No. DLA100-90-B-0254, issued by the Defense Personnel Support Center (DPSC) for flyer jackets. We deny the protest.

The solicitation was issued on March 27, 1990, for 18,192 flyer jackets. When bids were opened on April 26, Worthy was the low bidder and Isratex was second low. A preaward survey was performed on Worthy by the Defense Contract Administration Services Management Area (DCASMA), San Juan, Puerto Rico, which resulted in a "no award" recommendation based on deficiencies in the area of quality assurance capability. The contracting officer also became aware of two other recent (March 1990) preaward surveys performed on Worthy's capability to produce other items of military clothing which had resulted in "no award" recommendations, and in regard to which the Small Business Administration (SBA) subsequently declined to issue certificates of competency (COC). Based on all the data available, the contracting officer made a negative determination of responsibility.

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Because Worthy is a small business, the contracting officer referred the matter to SBA's New York Regional Office on June 8 for possible issuance of a COC. Due to a conflict of interest within the New York Regional Office, SBA transferred the matter to the Dallas Regional Office, which logged in the referral on June 14. Based on the June 14 date, SBA Dallas set a July 6 (15 working days) deadline for a COC determination, including a June 21 deadline for receipt of application materials from Worthy. Worthy was unable to meet the June 21 deadline because it claimed that it did not receive the application materials until June 22. SBA Dallas gave Worthy an extension to June 29 to submit its application, but did not so inform the contracting officer.

On June 21, SBA sent the contracting officer additional information as to Worthy's quality assurance capability, which it indicated it felt would result in a reversal of Worthy's nonresponsibility determination. The contracting officer informed SBA Dallas that he would thoroughly review the additional information, but would not extend the July 6 COC deadline; the contracting officer thereafter reviewed the information, but concluded that it was not sufficient to warrant a reversal of the nonresponsibility determination.

Worthy submitted its COC application to SBA Dallas on June 29. Also on June 29, SBA Dallas contacted DPSC to request an extension of the COC processing time, claiming that it would be unable to meet the July 6 deadline due to the hospitalization of key personnel. Citing the already passed target award date of April 1990 and the "urgent need" supply status for the item, DPSC declined to grant an extension beyond the July 6 deadline. When SBA failed to act on the COC by July 6, 15 working days after the June 14 receipt by SBA Dallas, SBA closed the case, citing its inability to complete an analysis by July 6 and DPSC's refusal to extend the deadline. Because no COC was issued, the contracting officer made an award to the next lowest responsible bidder, Isratex, on July 12. Performance of the contract has been suspended pending resolution of the protest.

Worthy claims that the contracting officer's refusal to extend the COC application period was arbitrary and capricious and had the effect of denying Worthy a fair hearing. Worthy argues that the "extraordinary circumstances" of the case prevented SBA from processing the COC by the original deadline and that it therefore was unfair for DPSC to refuse to grant an extension. In addition, Worthy claims that DPSC ignored the favorable information supplied to it by SBA on June 21, and that, in conversations with SBA personnel during the processing period, DPSC raised new issues of financial responsibility to further obstruct any award to Worthy. Worthy contends that DPSC's actions amount to bad faith.

When a contracting officer has made a negative determination of responsibility in regard to a small business, he is required to suspend award and refer the matter to SBA. Federal Acquisition Regulation (FAR) § 19.602-1; Lasanta Sportswear, Inc., B-218893, B-218893.2, June 3, 1985, 85-1 CPD ¶ 634. SBA has conclusive authority to review the nonresponsibility determination by issuing or declining to issue a COC. 15 U.S.C. § 637(b)(7)(A) (1988). SBA is required to issue or deny the COC within 15 business days after referral of the matter by the agency, or a longer period if agreed upon by SBA and the contracting agency. FAR § 19.602-2(a); F. Rulison & Sons, Inc., B-230758, Apr. 18, 1988, 88-1 CPD ¶ 379; Lasanta Sportswear, Inc., B-218893, B-218893.2, supra. If SBA has not issued a COC within 15 days (or longer, if agreed to), the contracting officer is to award the contract to the next appropriate, responsible offeror. FAR § 19.602-4(c); F. Rulison & Sons, Inc., B-230758, supra. The determination whether to grant an extension of the 15-day period is a matter within the contracting agency's discretion, which our Office will not review absent a showing that the decision to deny the request may have been made fraudulently or in bad faith. Id.


To establish bad faith, the courts and our Office require the presentation of very substantial proof that government officials had a specific and malicious intent to injure the protester. The Pepperdine Corp., B-225490, Dec. 24, 1986, 86-2 CPD ¶ 717. We find no evidence of bad faith on the part of DPSC. Worthy's position is founded largely on its view that DPSC should have acceded to SBA's extension request due to the initial delay in Worthy's receipt of the COC application materials from SBA and the illness, subsequently, that prevented the SBA Dallas official from processing Worthy's application by the July 6 deadline. As indicated above, however, there simply is no requirement that a contracting agency delay awarding a contract more than 15 working days to accommodate these or any other circumstances. FAR § 19.602-2(a). The controlling consideration is the government's interest in proceeding with the acquisition, not the offeror's interest in obtaining the extension. Pye & Hogan Machine Co., B-232554, Oct. 7, 1988, 88-2 CPD ¶ 335. It follows that the mere refusal of the contracting agency to agree to a further delay in the award does not evidence bad faith on the agency's part.

DPSC's refusal to overturn its nonresponsibility determination based on SBA's informal, unsolicited opinion of the updated quality assurance information SBA forwarded to the agency also does not show bad faith. The agency did not ignore the updated information; it just was not persuaded that the information overcame the findings of its preaward survey.

Further, DPSC had become aware of other recent negative preaward surveys of Worthy and SBA refusals to issue COCs to the firm. In light of these facts, DPSC decided it would abide by its original nonresponsibility determination unless SBA timely issued a COC. We see nothing improper in DPSC's actions. The fact that DPSC did not agree with SBA's informal opinion as to Worthy's responsibility, and thus reaffirmed its nonresponsibility determination, did not constitute bad faith. Rather, DPSC's position was entirely consistent with the statutory and regulatory framework that empowers SBA, not the contracting agency, to make a formal, binding responsibility determination by either issuing or not issuing a COC within 15 working days. Again, DPSC was not required to accommodate SBA's inability to meet this deadline by further delaying the award of an item in an urgent need status.

We conclude that DPSC did not act in bad faith, and that the award to Isratex therefore was proper. While it is unfortunate that the circumstances here may ultimately have militated against SBA's meeting the 15-day COC deadline, this possibility is inherent in the inclusion of a deadline in the process; by requiring that award be withheld and providing for an expeditious COC determination, the regulations seek to balance the interest of the small business concern in obtaining an independent review of its ability to perform against the interest of the government in proceeding with the acquisition. F. Rulison & Sons, Inc., B-230758, supra.

The protest is denied.

  
James F. Hinchman  
General Counsel